operations and later by Natoma and Natomas for irrigation purposes.

2. Petitioner's acquisition of the public utility property. In 1964 the CPUC issued *In re Natomas Water Co. and Southern Cal. Water Co.*, Cal. Pub. Util. Comm'n Decision No. 67299, slip op. (June 3, 1964) (hereinafter "D.67299"), approving petitioner's purchase of Natomas.[6] App. 48. The purchase included the right to divert no more than 60 cubic feet per second of water from the South Fork of the American River for use in the provision of water service. D.67299 found that petitioner "proposes to render water service to the public in the territory served by Natomas, through the property being sold . . . ." App. 50, 52; *and see* Agreement for the Sale of Assets of Natomas Water Company.

3. Petitioner's first transfer of a portion of the property. In 1967 petitioner filed an application with the CPUC for authority to transfer a portion of its water right to the City of Folsom (hereinafter City). App. 42. The CPUC approved an agreement between the City and petitioner in *In Re Southern Cal. Water Co. and City of Folsom*, Cal. Pub. Util. Comm'n Decision No. 71889, slip op. (January 24, 1967) (hereinafter "D.71889"), which permitted petitioner to transfer to the City the perpetual right to the exclusive use of eleven-sixteenths of the water right purchased from Natomas in 1964. App. 44-45. In approving the transfer of the eleven-sixteenths share of petitioner's right to the flow from the South Fork of the American River, the CPUC relieved petitioner of its public utility obligation with respect to that portion of its water

[6] Petitioner is a water utility subject to the CPUC's jurisdiction.

right, but not to its remaining five-sixteenths share. App. 44-45; *see also* App. 38.

4. Petitioner's second transfer of a portion of the remaining property. In March 2004, by D.04-03-039 as modified, the CPUC found that: 1) the entire right to divert flow at a rate of up to 60 cubic feet per second from the American River constituted about 32,000 AFY of water and was included in petitioner's 1964 purchase of Natomas as dedicated public utility property; 2) a portion equivalent to about 22,000 AFY of the water right was properly transferred to the City in 1967 pursuant to D.71889; 3) the remaining five-sixteenths share of the right, about 10,000 AFY, continued to be petitioner's utility property; 4) the entire cost of the Natomas purchase was borne by petitioner's ratepayers, including the water right; 5) in 1994, petitioner entered into a contract, unbeknownst to the CPUC, with the City whereby it permanently leased half (i.e., about 5,000 AFY) of its remaining five-sixteenths share of the water right;[7] 6) petitioner recorded all of the revenues from that transfer in a non-operating below-the-line account that benefits only shareholders; 7) the water right transferred to the City by the 1994 agreement was "'useful' as that term is used in § 851, because it enhances [petitioner's] ability to meet future water supply contingencies;" and 8) petitioner prevented the CPUC from assessing whether the transfer of the water right could undermine petitioner's ability to respond to water supply contingencies thereby adversely impacting ratepayers and from assessing the effect of the below-the-line treatment of

[7] *See* Agreement for Reallocation of Water under Co-Tenancy Agreement. Petitioner "did not seek [CPUC] approval under Public Utilities Code § 851 for the 1994 lease with the City." App. 2.

lease revenues, as well as from considering any environmental impacts associated with the transfer and whether any mitigations were needed. Pet. App. 115a-116a, 122a-124a; App. 37-45. Further, D.04-03-039 also concluded that the water right was "an essential element" of petitioner's water utility company that constituted a property right that can be enjoyed even if not immediately exercised, and that the entire amount of water conferred by the right acquired in 1964 constituted utility property, as did the remaining portion following the conveyance of eleven-sixteenths to the City in 1967. Pet. App. 123a. D.04-03-039 determines that in failing to obtain CPUC authorization for the transfer of a portion of petitioner's remaining five-sixteenths share of the right, petitioner violated section 851 because the entire remaining share was useful in the performance of its duties to the public. Pet. App. 124a.

D.04-09-028 recounts the use of the water right by petitioner and its predecessors, finding that from 1966 to 1970 petitioner used approximately 500 AFY of the water right to serve irrigation customers, that petitioner constructed a treatment plant in 1973 that was capable of treating and distributing at least 5,000 AFY of the American River water entitlement, and that petitioner's use of its right fluctuated from about 678 AFY in 1973 to about 3,451 AFY in 1990. App. 14-15. D.04-09-028 finds: "At no point between the time [petitioner] purchased Natomas and the time it entered into the lease agreement with the City did [petitioner] declare that a portion of its water rights was private property. At no time did it use any of that water for its own private purposes." App. 30. In 1994 petitioner implemented a water supply policy concentrating on groundwater rather than surface water since groundwater was then less expensive; however, also in 1994 petitioner began discovering contamination in some

of its groundwater wells. App. 15-16. By 1997 increasing water contamination was apparent. In 1998, further pollutants began appearing in some of its groundwater supply, leading to the loss of 11 of petitioner's 21 wells. App. 16. To compensate for the loss, petitioner entered into a take-or-pay contract for delivery of non-potable water from the American River and the construction by petitioner of new facilities to treat that water for human consumption, all at a cost to its ratepayers.[8]

In April 2004, by D.04-04-046, the CPUC modified D.04-03-039, finding that section 851 protects the City's acquired interest in the water right on a prospective basis since it is a good faith purchaser for value, and required petitioner to file a section 851 application. App. 10. Petitioner timely applied for rehearing of D.04-03-039, as modified by D.04-04-069, making some of the arguments it raises in its petition to this Court, and in September 2004 the CPUC issued D.04-09-028, modifying D.04-03-039, as modified by D.04-04-069, and denying rehearing of the challenged decision.[9]

Following the issuance of D.04-09-028, petitioner filed a petition for writ of review of D.04-03-039, as modified by D.04-04-069 and D.04-09-028, with the California Supreme Court, arguing that "[t]his case turns on the meaning of the term 'useful' in [s]ection 851 of the California Public Utilities Code." The California Supreme Court summarily denied the petition on February 16, 2005. Pet. App. 132a.

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[8] App. 16.

[9] App. 28-32.

REASONS FOR DENYING THE PETITION

Petitioner presents no good reasons warranting review by this Court. Petitioner's claim that the challenged decision, as modified, is wrong as a matter of law, logic and policy is hyperbole not borne out by the plain language of section 851 and simple facts in the evidentiary record that overwhelmingly support the CPUC's findings and conclusions.[10] Petitioner's claim that its water right was never dedicated to public use is refuted by every fact in the underlying proceeding and contradicted by petitioner's own recitation of the facts in its petition before this Court. Aside from attempting to rewrite over 150 years of history, petitioner is not only asking this Court to review the record below de novo and substitute its judgment for the CPUC's findings of fact and conclusions of law but is using its petition to impermissibly challenge D.71889 and D.67299, well beyond the 30-day statutory period for applying for rehearing of CPUC decisions.[11]

There is no merit to petitioner's argument. Unlike in the cases upon which petitioner relies, the water right at

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[10] Petitioner has failed to show that the challenged decisions are not supported by substantial evidence. Section 1757.1; *City of San Francisco v. Public Utilities Comm'n*, 39 Cal. 3d 523, 530 (1985); *Southern Cal. Gas Co. v. Public Utilities Comm'n*, 23 Cal. 3d 470, 480 (1979); *Yucaipa Water Co. No. 1 v. Public Utilities Comm'n*, 54 Cal. 2d 823, 828 (1960). In *City of S.F.*, *supra* 39 Cal. 3d at 530, the court stated: "[T]he [CPUC's] findings are ordinarily conclusive and not subject to review." Further, if they are supported by any evidence, such findings may not be set aside. *Id.* citing *Yucaipa Water Co. No. 1*, *supra* 54 Cal. 2d at 828.

[11] Pursuant to section 1756 an application for rehearing challenging the lawfulness of a [CPUC] decision must be filed within 30 days from the date the decision is mailed. *See also*, CPUC Rules of Practice and Procedure, rule 85.

issue was suffused with a beneficial use and used to serve public utility customers when petitioner purchased it, has continuously been used to serve the public, retained its public use status after the CPUC authorized petitioner, pursuant to section 851, to transfer a portion of it to a municipal utility in 1967, and remains to this day, necessary and useful to petitioner's public utility service.

In 1967 petitioner complied with the section 851 requirement that it obtain CPUC approval prior to any transfer of a portion of the water right. App. 44-46. As petitioner readily acknowledges, nothing substantial changed regarding the property between 1964 when petitioner purchased it and 1994 when it transferred another portion of its right without proper CPUC authorization. App. 27. In 1967, the CPUC found that the portion transferred to the City was no longer necessary and useful to petitioner's water utility business. App. 45. Petitioner did not ask and the CPUC did not find that the remaining five-sixteenths portion was no longer necessary and useful to its public utility service. Petitioner has failed to explain why it did not pursue its current argument in 1967, when it first sought authority under section 851 to transfer a portion of its right to the City. If petitioner was so certain that the facts establish that a portion of its right was not subject to section 851, it should have brought the issue to the CPUC's attention then. App. 27-28. Petitioner has an obligation under California law to come before the CPUC prior to leasing away its water rights and it failed to do so.[12] Petitioner's unilateral conclusion that it did not need authorization in 1994 to transfer a portion of property

[12] Cal. Const. art. XII § 3; Pub. Util. Code §§ 216, 702, 851, 2106, 2107; CPUC's Rules of Practice and Procedure, rule 1.

already dedicated to public use disregards the California Constitution and Public Utilities Code, as well as relevant federal and California case law.

1. THERE IS NO TAKING BECAUSE THE WATER RIGHT HAS ALWAYS BEEN DEDICATED TO THE PUBLIC BENEFIT AND USEFUL TO THE PETITIONER AND ITS PREDECESSORS IN SERVING THE PUBLIC.

Petitioner bases its takings argument on certain undisputed facts settled by the evidentiary record which supports D.04-03-039, as modified by D.04-04-069 and D.04-09-028: Petitioner, like its predecessors, has continuously used water from this right to serve its customers; also like its predecessors, it has never used the entire amount of water the right entitles it to use.[13] App. 29-30. Petitioner made the same argument to the CPUC and the California Supreme Court that it now makes to this Court, and D.04-09-028 addresses it:

> As with its other arguments, [petitioner's] entire takings argument rests on the position that the

[13] Although definitive numerical values (e.g., 10,000 AFY) have been used to describe the right, in reality the exact figure equaling the volume of the total annual water the right entitles petitioner and its predecessors in interest to divert is really an estimate of the maximum amount of water petitioner has a right to apportion from the river, conditions permitting. On any given day, the actual amount of water that is the subject of the type of water right in question is largely determined by natural forces. *People v. Murrison*, 101 Cal. App. 4th 349, 359 (2002), *review denied*, 2002 Cal. LEXIS 7988 (Nov. 20, 2002); *United States v. State Water Resources Control Bd.*, 183 Cal. App. 3d 82, 104 (1986). The right at issue is to divert up to a particular volume of water flow.

> water rights in question are private, as opposed to utility, property. [Petitioner] spends six pages of its application for rehearing presenting an analysis of takings law as it applies to private water rights. While this discussion is interesting, it simply does not apply if the water rights in question are not private property.
>
> *The takings argument fails from two standpoints. First . . . [petitioner's] argument that the leased water rights are private property lacks merit; therefore, there is no taking – property that is useful to the business of providing water to the public cannot be taken by our lawful exercise of our jurisdiction under section 851. Second . . . we have determined that the lease is valid as to Folsom and have ordered [petitioner] to file a section 851 application (which it has done) for authorization of the lease. This is exactly what [petitioner] has, since 1994, wanted to do with the 5,000 AFY of water . . . . Hence, even if there were a shred of merit to [petitioner's] argument about private property, nothing about our actions at this point . . . amounts to a taking of any property of [petitioner].*

App. 30-31, emphasis added. Petitioner's assertion that its water right was never dedicated to public use is disingenuous and completely contradicted by the facts. The water right was public utility property dedicated to and used by the public since the days of Natoma. Petitioner purchased it as such from Natomas and continued to use it as such following D.67299. Even if the water right had not been dedicated to public use when petitioner purchased it (although it clearly was), D.71889 found that it was dedicated property and further found that eleven-sixteenths of the total right was no longer necessary and

useful and permitted petitioner to sell that portion to the City. The remaining five-sixteenths remained necessary and useful, regardless of whether it was potable water or whether petitioner chose to use all or a portion of it.

Petitioner has cited no cases that support its argument that it holds the power to determine that dedicated property used in public service is no longer necessary and useful if not all of it is being used. The argument is equivalent to asserting petitioner is empowered to declare that its groundwater wells and/or the waters in them are not dedicated to public service if petitioner is not using one hundred percent of the water in those wells. The proposition is wrong as a matter of settled utility law.

2. PETITIONER'S DEDICATION ARGUMENT IS BASED ON ARBITRARY ASSUMPTIONS AND A COMPLETE DISREGARD OF THE FACTS.

Petitioner's argument that it dedicated 5,000 AFY but not the full 10,000 AFY equivalent of its five-sixteenths remaining water right to public use cannot survive petitioner's logic. Petitioner asserts that it has never used more than 3,500 AFY of its entitlement, yet simultaneously argues that 5,000 AFY of its remaining entitlement is dedicated. Petitioner cannot justify the difference between the 1,500 AFY it claims is dedicated but never used and the other 5,000 AFY equivalent of its remaining five-sixteenths right that it claims is not dedicated because petitioner had not made use of it. Thirty-eight years ago, the CPUC found the five-sixteenths share of the water right at issue here to be public utility property for all of the reasons already discussed above and set forth in the challenged decisions.

The facts of D.04-03-039, as modified, are entirely distinguishable from those giving rise to *Richfield Oil Corp. v. Public Utilities Comm'n*, 54 Cal.2d 419 (1960), *cert. denied sub nom. Southern Counties Gas Co. v. Public Utilities Comm'n*, 364 U.S. 900 (1960), and the line of cases cited by petitioner, all of which concern whether a non-public utility entity or non-dedicated property has attained, by virtue of its use, public utility status. Petitioner disregards the plain language of section 851 and confuses the necessity and usefulness of its entitlement to its right with its decision not to use all of the water it is entitled to divert. In what may be considered the ultimate irony, the usefulness of the right was manifested almost immediately in the contamination of petitioner's wells, following petitioner's unilateral transfer to the City. Because petitioner was no longer able to make full use of its entitlement, it became absolutely necessary that it seek alternate supplies of water from other, more expensive sources, to the detriment of its customers.

CONCLUSION

The issues presented by petitioner are entirely fact dependent and affect only petitioner. Although petitioner argues an unconstitutional taking, in reality, petitioner is challenging the CPUC's proper exercise of its jurisdiction to apply a long-standing state law to petitioner's unique facts. The CPUC considered all of the arguments petitioner has raised to this Court and correctly decided the issues. Petitioner exercised bad judgment in 1994, and its argument is without merit. This is not a case of national importance and there are no conflicting decisions at issue. This case is not worthy of this Court's attention.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for the Public Utilities Commission of the State of California

June 17, 2005

Mailed April 27, 2004

Decision **04-04-069 April 22, 2004**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA WATER COMPANY (U 133-W), for an order authorizing it to increase rates for water service by $19,826,100 or 29.72% in the year 2003; by $6,327,800 or 7.31% in the year 2004; and by $6,326,200 or 6.81% in the year 2005 in its Region III Service Area and to increase rates for the General Office Allocation in all of its Customer Service Areas in this Application including: Arden-Cordova, Bay Point, Clearlake, Los Osos, Ojai, Santa Maria, Simi Valley and Metropolitan.	Application 02-11-007 (Filed November 4, 2002)

OPINION GRANTING PETITION TO MODIFY D.04-03-039

I. Summary

On March 16, 2004, the Commission adopted Decision (D.) 04-03-039, which grants Southern California Water Company (SCWC) authority to increase rates in its Region III Service Area. The Commission found that SCWC violated Public Utilities Code Section 851 (§ 851) when it failed to seek the Commission's approval for its lease of water rights to the City of Folsom (City). Additionally, the

Commission held that the City's retrospective use of the water rights was unaffected by the voided lease agreement. The Commission deferred to a subsequent decision, following briefing by the parties, the issue of Folsom's prospective rights under the voided lease. The City seeks relief, as it believes that serious and immediate effects have occurred because the Commission did not preserve its prospective rights under the lease. As such, the City has filed a petition to modify D. 04-03-039's treatment of prospective water rights leased from SCWC. After a review of the new information provided to the City, we conclude that § 851 protects the City's acquired interest in the water both with respect to the past and to the future notwithstanding our voiding of the lease as to SCWC.

II. Background

By D.71889 issued January 24, 1967, the Commission authorized SCWC to transfer the City water system and 22,000 acre feet per year (AFY) to the City of Folsom. In November 1994 SCWC signed an agreement to lease in perpetuity an additional 5,000 AFY to the City. SCWC did not seek Commission approval under Public Utilities Code § 851 for the 1994 lease with the City. As a result, the Commission determined that SCWC violated § 851 by not seeking approval for a water rights lease agreement that it entered into with the City (D.04-03-039). Accordingly, the Commission fined SCWC a net total of $180,000 ($1,095,000 with $915,000 suspended) for that violation. Moreover, the Commission determined that while the City acted in "good faith for value", the City was entitled only to retrospective protection of its lease of water rights, pending further record development in the issue of Folsom 's prospective rights under the voided lease.

III. Discussion

This petition to modify narrowly focuses on the issue of prospective water rights leased by the City in an agreement with SCWC in 1994. The Commission found in D.04-03-039 that SCWC had violated § 851 by failing to seek Commission approval to lease 5,000 AFY to the City in perpetuity. The City alleges that by not protecting its future rights under the lease, the Commission has caused immediate and severe harm. Specifically, by placing a cloud over the City's right to the leased water, the Commission has made it difficult or impossible for the City to refinance on unfavorable terms over $100 million of existing utility bonds; has placed the City in potential default under existing bond indentures; jeopardized planned expansion in the City's East Area particularly including the planned development of a desperately needed hospital and urgent care facility; and generally rendered doubtful various developments contained in the City's master plan for the East Area all of which assume the continuing availability of the leased water.

To address these concerns we revisit the plain words of the relevant statute. The relevant part of § 851 reads:

> . . . any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value : . .

D.04-03-039 (page 53) concludes that the City is a good faith purchaser for value and therefore entitled to protection of its water rights on a retrospective basis. The City argues that the Commission, by not also granting a

prospective approval of the leased water rights, is misinterpreting the language and intent of the statute.

The Commission, however, must reconcile the City's needs with its obligation to enforce § 851 in order to determine whether the transaction (in this case, the agreement between the City and SCWC for leased water) serves the public interest. To this end, D.04-03-039 notes that there are several factors that the Commission must consider before granting § 851 approval. For example, the Commission must assess whether the proposed transaction will impair the utility's ability to provide service to the public. As such, SCWC must demonstrate that its water quality and supply problems can be addressed without the leased water supply (see Decision at page 44).

In D.04-03-039 it was concluded that SCWC violated § 851 when it failed to gain the Commission's approval prior to entering into an agreement with the City for leased water rights. As part of the remedy outlined in D.04-03-039, the Commission voids the lease as to SCWC, and fines SCWC the net sum of $180,000.

In its petition to modify D.04-03-039, the City of Folsom has presented new evidence that heretofore has not been considered by the Commission. Ten years after the execution of the leased water rights agreement with SCWC, on March 16, 2004, the City first learned that the Commission had issued a decision voiding the leased water agreement. On March 26, 2004, the City filed a petition to modify D.04-03-039. Upon further review of the City's petition, we conclude that § 851 protects the City's acquired interest in the water both with respect to the past and to the future notwithstanding our voiding of the lease as to SCWC. Accordingly, within 30 days from the

issuance of this opinion, we direct SCWC to file a § 851 application for the leased water rights agreement with the City. This requirement provides clarity to SCWC that it is expected to file a § 851 application.

In view of this revision to our original decision, we also revise our order. We direct that the parties in that application proceeding address the following topics:

1. How SCWC will obtain water sufficient to serve its customer base without the 5,000 AFY leased to the City.

2. The proper accounting and ratemaking treatment of future lease revenues under the City lease.

3. Any appropriate measures to ensure ratepayers are not adversely affected by the lease of water rights to Folsom.

IV. Comments on the Proposed Draft Decision

On March 26, 2004, a "Proposed Draft Decision of President Peevey and Commissioner Kennedy", which addressed Folsom's petition for modification was issued. Comments were due on March 30, 2004. Comments were timely filed by Southern California Water Company, City of Folsom and the Office of Ratepayer Advocates. By way of summary, Folsom supported the draft decision with minor changes. Their comments were considered and changes to the draft decision were not deemed necessary. The SCWC supported the draft decision but sought clarification as to whether or not they had to file a brief addressing the rights of Folsom under three different circumstances. The draft decision provided clarity and required that SCWC file a § 851 decision within 30 days of

the decision. ORA challenged the draft decision's conclusion that Folsom is a "bona fide purchaser" and entered into the leased water rights agreement with SCWC in good faith for value. ORA argued that an appropriate reading of § 851 would lead one to conclude that the water rights still are useful to SCWC and that prospective use of the leased water could not be granted until the Commission determines that the property is not useful to SCWC. We disagree.

The Commission does not have the power under § 851 to declare Folsom's entitlement to the water rights void; it has only the power to declare the lease of those rights void. The second paragraph of § 851, in our opinion, recognizes that a good faith purchaser for value from an owner with good title, like the water company, is going to acquire good title from his seller.

On March 26, 2004, an Alternate Draft Decision of Commissioner Lynch was issued for comment. The voiding of the lease pursuant to Ordering Paragraph 7 of D.04-03-039 was stayed in order to clarify Folsom's continuing right to use water under the lease. The alternate draft decision was adopted at the April 1, 2004 Commission Meeting. There was no action taken on the Peevey and Kennedy draft decision. Accordingly, an Assigned Commissioner's Ruling was issued on April 2, 2004 that bifurcated the issue of Folsom's prospective use of the leased water from the Commission's consideration of SCWC's § 851 application. Also, an oral argument on April 19, 2004 was granted to allow parties further opportunity to comment on the prospective use of leased water by Folsom. Due to the very short comment period for the March 26, 2004 draft decision, additional comments were taken.

The re-circulated draft decision of President Peevey and Commissioner Kennedy in this matter was mailed to the parties in accordance with Public Utilities Code Section 311(g)(1) and Rule 77.7 of the Rules and Practice and Procedure. Comments were due on April 14, 2004, and an oral argument was held on April 19, 2004. Comments were timely filed by Southern California Water Company, City of Folsom and the Office of Ratepayer Advocates. SCWC argues that § 851 provides that a disposition of property by a public utility shall be conclusively presumed to be property, which is not useful or necessary of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value. SCWC suggests that past Commission decisions and California case law would provide Folsom with a favorable reading of its prospective right to the leased water.

Folsom again supports the Peevey and Kennedy draft decision and in doing so provides an extensive legal analysis of the legislative intent of § 851, past Commission decisions, and California case law. In sum, Folsom argues that the plain language of § 851 conclusively establishes the rights of good faith purchasers for value in their acquired property. Folsom adds that the legislature clearly intended to protect purchasers dealing with such property in good faith for value. In short, Folsom concludes that the Commission is statutorily precluded from voiding the property rights of a good faith purchaser for value. We agree.

ORA, after having more time to reflect and analyze the legal implications of granting Folsom's prospective use of the leased water rights, reverses its earlier course and acknowledges that Folsom has a continuing right to the leased water, assuming it is a good faith purchaser. ORA

now recognizes that underlying Commission decisions and a Supreme Court opinion supports Folsom's argument that it as a good faith purchaser is prospectively entitled to the leased water. Nonetheless, ORA is not convinced that Folsom has conclusively demonstrated that it is a bona fide purchaser to the leased water, although no party (including ORA) asserts otherwise, and would require that this issue be disposed of in SCWC's § 851 application. To our knowledge, no party has provided evidence that Folsom is not a bona fide purchaser; in fact Folsom has submitted two declarations by its City attorney that it indeed is a bona fide purchaser, and, further argued that the Commission has already disposed of this factual issue in D. 04-03-039, by finding Folsom properly used the water rights since the inception of the sale transaction.

On April 16, 2004, Folsom submitted a Motion to Strike Section II of ORA's supplemental comments. We will not strike ORA's comments as we believe that ORA is entitled to provide analysis and conclusion on the issue of Folsom's water rights. However, we decline to devote further hearing or deliberative efforts on this issue. Additionally, Folsom filed a supplemental declaration of Mr. Steven P. Randolph on April 16, 2004 in support of Folsom's petition for modification. This filing is similar to the declaration that Mr. Randolph executed on March 25, 2004.

V. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and David Fukutome is the assigned ALJ in this proceeding.

Findings of Fact

1. In D.04-03-039, the Commission found that SCWC violated § 851 by not seeking the Commission's approval for its lease of water rights to the City.

2. As part of the remedy outlined in D.04-03-039, the Commission voided the lease as to SCWC, and fined SCWC the net sum of $180,000.

3. In D.04-03-039, the Commission safeguarded the City's retrospective rights under the voided lease agreement and reserved decision on the City's prospective right pending further record development.

4. As a result, the City has filed a petition to modify D.04-03-039 because of the serious and immediate effects that occurred because the Commission did not protect its prospective rights under the lease.

5. The City may have to refinance on unfavorable terms over $100 million of existing utility bonds.

6. The City may be in jeopardy in being able to finance planned expansions of the City's East Area.

Conclusions of Law

1. The City has demonstrated that there are severe and immediate impacts to its water supply and financial health because the Commission did not grant prospective approval of its leased water rights.

2. Pursuant to Government Code Section 11125.3 (a)(2), there exists a need to take immediate action in that the City of Folsom's water supply may be severely curtailed and its financial condition negatively impacted if

the Commission does not review its D.04-03-039 adopted March 16, 2004; this need for action came to the Commission's attention subsequent to the mailing of its April 1, 2004 agenda.

3. The Commission in D.04-03-039 concludes that the City is a good faith purchaser for value in compliance with § 851.

4. In this instant case, the Commission must reconcile the City's needs for the leased water rights to its obligation to enforce § 851 by determining whether or not the agreement between the City and SCWC for leased water serves the public interest.

5. After a review of new information, the Commission concludes that § 851 protects the City's acquired interest in the water both with respect to the past and to the future notwithstanding the voiding of the lease as to SCWC.

ORDER

IT IS ORDERED that:

1. Within 30 days from the issuance of this opinion Southern California Water Company is to file a § 851 application for the leased water rights agreement with the City of Folsom.

2. We direct that the parties in that application proceeding address the following topics:

a. How SCWC will obtain water sufficient to serve its customer base without the 5,000 AFY leased to the City.

b. The proper accounting and ratemaking treatment of future lease revenues under the City lease.

c. Any appropriate measures to ensure ratepayers are not adversely affected by the lease of water rights to Folsom.

Dated April 22, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to file a concurrence.

/s/ LORETTA M. LYNCH
Commissioner

I reserve the right to file a concurrence.

/s/ SUSAN P. KENNEDY
Commissioner

I reserve the right to join Comr. Kennedy's concurrence.

/s/ GEOFFREY F. BROWN
Commissioner

MAIL DATE
September 9, 2004

Decision 04-09-028 September 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA WATER COMPANY (U133-W), for an order authorizing it to increase rates for water service by $19,826,100 or 29.72% in the year 2003; by $6,327,800 or 7.31% in the year 2004; and by $6,326,200 or 6.81% in the year 2005 in its Region III Service Area and to increase rates for the General Office Allocation in all of its Customer Service Areas in this Application including: Arden-Cordova, Bayu Point, Clearlake, Los Osos, Ojai, Santa Maria, Simi Valley and Metropolitan.	Application 02-11-007 (Filed November 4, 2002)

ORDER MODIFYING AND DENYING REHEARING OF DECISION 04-03-039

Decision (D.) 04-03-039 (the Decision), challenged in this case by the Southern California Water Company (SCWC), granted in part SCWCs application to increase rates for years 2003-2005 in its Region III Service Area. The Decision also held that SCWC violated Public Utilities

Code section 851[1] when in November 1994, without seeking Commission approval, SCWC entered into a lease agreement with the City of Folsom (City or Folsom) allowing the City in perpetuity to lease 5,000 acre-feet per year (AFY) of water rights from SCWC's 10,000 AFY allocation of water from the American River. SCWC had been booking the revenues from this lease in a non-operating revenue account. The Decision concluded that this lease is void, imposed a fine on SCWC, and ordered 70% of the revenues received under the lease to be credited to SCWC's ratepayers. In addition, the Decision held that the City's retrospective use of the water rights was unaffected by the voided lease agreement.

SCWC filed a timely application for rehearing, in which it challenges the Decision's application of section 851, the imposition of the fine, and the revenue credit to ratepayers, including the interest rate applied. The Commission's Office of Ratepayer Advocates (ORA) filed a response in opposition.

We have reviewed SCWC's 53-page application, much of which has been argued in the course of this case, and are of the opinion that no grounds for granting rehearing have been stated. With the possible exception of its challenge to the interest rate, all of SCWC's arguments rely on its fundamental claim that the water rights it leased to the City in perpetuity are private property that was not useful to the provision of public utility service in 1994. Because the record and relevant legal authority provide a basis for our finding to the contrary, we find that none of

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[1] All statutory citations are to the Public Utilities Code unless otherwise stated.

SCWC's arguments relative to section 851, including its constitutional claims, have merit. Its challenges to the fine and reallocation of past lease revenues likewise fail. We do modify the Decision to further clarify our rationale for both the reallocation and the interest rate we apply. The remainder of D.04-03-039, as modified by D.04-04-069[2], remains the same.

We preface our analysis by setting forth in more detail the background of this case.

BACKGROUND

In June 1964, SCWC purchased the Natomas Water Company. With the purchase, as is clearly spelled out in the contract governing the purchase (Ex. 56; see also ORA Opening Brief (O.B.), p. 35), SCWC obtained 32,000 AFY of water rights to the American River.[3] Subsequently, in January 1967, the Commission in D.71889 authorized SCWC to transfer its Folsom water system and 22,000

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[2] D.04-04-069 is discussed below.

[3] Section 1.01 of the contract, titled "The Property Identified," states:

> "The "Property" herein referred to is all the properties, whether real, personal or mixed, tangible or intangible, used by or useful to Seller in connection with the performance of its duties to the public. The property includes, by way of illustration and not as an enumeration:
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> "d) Water Rights. All water and water rights both surface and subsurface (including inchoate rights and undivided interests and rights), owned or claimed by Seller on the Closing Date including without limiting the generality of the foregoing all rights involved in or created by the Contract for Relocation, Rearrangement or Alteration of Facilities (the 'Contract') attached hereto as Schedule C." Ex. 56.

AFY of its American River water rights to the City of Folsom.

From 1966 to 1970, SCWC used approximately 500 AFY of raw, untreated water from the American River to serve irrigation customers in Rancho Cordova. At that time, SCWC had no facility to treat surface water, since with the transfer of the Folsom water system, the City had acquired the Folsom Treatment Plant.

SCWC constructed the Coloma Treatment Plant, which became operational in 1973, to treat surface water. The plant and system that was recorded in SCWC's rate base could treat and distribute, according to SCWC, only 5,000 AFY of SCWC's American River water entitlement. The record in this case contains a chart showing that SCWC's use of surface water ranged from a low of 678 AFY in 1973 to 3,451 AFY by 1990. (Ex. 38, ex. B.)

By 1994, SCWC had begun implementing a water supply policy that concentrated on groundwater rather than surface water for supplying its public utility customers. Among other reasons, groundwater was cheaper, since the cost to produce and deliver it did not include the labor cost of operating the Coloma plant, as was the case with surface water. In November of 1994, SCWC entered into the agreement with Folsom to lease to the City in perpetuity 5,000 AFY of its remaining 10,000 AFY entitlement of American River water. At that time, SCWC had not been taking more than 3,451 AFY of that entitlement. SCWC did not come to the Commission for authorization under section 851 before entering into the agreement with Folsom. SCWC did provide Folsom with a letter from counsel in which counsel stated that other than the consent the U.S. Bureau of Reclamation had given, SCWC

needed no governmental permits or approvals to proceed with the lease agreement. (See Declaration of Steven P. Rudolph in Support of City of Folsom's Petition to Modify and Motion to Partially Stay Decision 04-03-039, Ex. D, p. 4, para. 7.) SCWC booked lease revenues in PUC Account 526, Miscellaneous Non-Operating Revenues, which is a below-the-line account solely benefiting shareholders.

Also in the 1994 timeframe, SCWC began experiencing problems with contamination in some of its groundwater wells. According to SCWC, at that time the only contamination believed to be a problem was from trichloroethylene (TCE), which could be removed by installing granulated activated carbon filters on the wells. However, in the 1997 timeframe, per chlorate contamination became apparent; in 1998, NDMA appeared on the scene. Neither of those chemicals is able to be removed like TCE is, and SCWC has had to take 11 out of 21 wells out of service. To assure the necessary continued water supply, the company has placed into operation several new groundwater wells located away from the contamination. It has also entered into a five-year take-or-pay contract with the Sacramento Municipal Utilities District for 10,000 AFY of American River water, which SCWC says has necessitated installing new treatment capacity. Ratepayers will be footing the bill for this replacement water.

The issue of whether SCWC should have come to the Commission for prior authorization of the lease was raised when the Commission staff, in the course of reviewing documents for SCWC's test year 2001 General Rate Case (GRC) for SCWC's Region I, discovered the lease revenues in Account 526. Staff contended that SCWC had violated section 851, which SCWC rebutted. The Region I GRC was settled, and the settlement agreement deferred the lease

issue to SCWC's GRC for Region II, expected to be filed in early 2001. That GRC was not filed; thus the issue has been raised in this proceeding, SCWC's GRC for Region III, filed November 4, 2002.

The Decision, issued March 16, 2004, finds that SCWC violated section 851 in failing to obtain Commission approval for the lease, voids the lease as to SCWC, and fines SCWC $1,095,000, of which $915,000 is suspended, for a net fine of $180,000. The Decision also assigns all lease proceeds from the date of the Decision forward to an operating revenue account, and directs a credit to future rates equal to 70% of lease revenues received from the inception of the lease to the effective date of D.04-03-039, plus 7% interest. The Decision holds that the City's retrospective use of the water rights is unaffected by the voided lease agreement, but defers to a subsequent decision, following briefing by the parties, the issue of Folsom's prospective rights under the voided lease.

Significant procedural developments occurred after the issuance of the Decision which have a bearing on SCWC's application for rehearing. Within days after the Decision was issued, the City filed a motion for partial stay and a petition for modification of it, claiming that serious and potentially devastating economic and financial effects would occur because we did not preserve the City's prospective rights under the lease. The City had received no notice that the issue of the validity of the water rights lease was before the Commission, and was not a party in this case. The City asked us to clarify that as to Folsom, a good faith purchaser for value under section 851, the agreement with SCWC creating the lease is not void. SCWC supported Folsom's requests.

In support of its motion for partial stay and petition for modification, the City submitted new information to the Commission on the City's financial situation, as well as legal analysis on the second paragraph of section 851, which provides in relevant part:

> "[A]ny disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value. . . ."

On April 1, in D.04-04-018, we stayed Ordering Paragraph 7 of the Decision as to the City's prospective rights, pending clarification of the City's continuing right to receive water under the lease. In other words, we stayed the voiding of the lease prospectively as to Folsom.

After reviewing Folsom's new information and analysis in detail, we concluded in D.04-04-069 (the Modification Decision), issued April 22, that since the City was a lessee acting in "good faith for value," section 851 protects its acquired interest in the water both with respect to the past and to the future, notwithstanding our voiding of the lease as to SCWC. However, we also concluded we must "reconcile the City's needs for the leased water rights to [the Commission's] obligation to enforce section 851 by determining whether or not the agreement between the City and SCWC for leased water serves the public interest." (D.04-04-069, Conclusion of Law 4, p. 9.) thus we ordered SCWC to file a section 851 application by May 27. The company did so, and that application is now under review by ALJ Fukutome, who was also the ALJ in the instant case.

Prior to issuance of the Modification Decision, SCWC filed its application for rehearing of the Decision. SCWC's voluminous application, which, of course, does not take into account the changes made in the Modification Decision, contends that: A) the Decision erroneously finds that the lease violates section 851, because the water rights leased to the City are not "used and useful" property; B) the Commission has unconstitutionally exceeded its jurisdiction because the water rights at issue are not "dedicated to a public use;" C) the Decision imposes a taking without just compensation, in violation of the California and U.S. Constitutions; D) the Decision violates Article X, section 2 of the California Constitution requiring reasonable and beneficial use of water; E) the fine of $1,095,000 (all but $180,000 of which was suspended) is unlawful; F) the allocation of 70% of the lease revenues to ratepayers is arbitrary; and G) the 7% interest rate on the ratepayer allocation of those revenues is contrary to Commission precedent.

ANALYSIS

A. SCWC's Section 851 Arguments.

SCWC begins its challenge to D.04-03-039 by arguing that the Decision unlawfully and erroneously applies section 851 to the 1994 lease. The gist of this argument is that the American River water rights held by SCWC are private water rights, having never been dedicated to public utility service; thus the Commission has no authority to regulate them and cannot apply section 851 to any transaction involving those water rights. SCWC claims that both the statute itself and Commission decisions issued prior to November 1994, when the lease was entered into, support its argument.

Section 851 provides, in relevant part:

> "No public utility . . . shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its . . . property necessary or useful in the performance of its duties to the public . . . without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing it is void. . . ."

SCWC first argues that its water rights were not necessary or useful in the performance of its duties to the public. SCWC contends that in general, the utility is the entity which makes the initial decision whether an item of property is necessary or useful, *In re Citizens Utilities Co. of California* (1988) 28 Cal. P.U.C.2d 108, 119, and at the time of the November 1994 lease, SCWC had made the decision that 5,000 AFY of its water rights were not necessary or useful. This was because as of November 1994, SCWC had never used more than 3,451 AFY of its total remaining 10,000 AFY rights for any purpose whatsoever; had never used any of its American River water to provide potable water but only irrigation water, and had been developing ground water wells to service the majority of its customers with potable water; and had never developed water treatment facilities which could treat more than 5,000 AFY.

SCWC has it backwards. In case after case, it is the Commission that determines, after a utility comes in for section 851 approval, that such approval is or is not required because the property is or is not necessary or useful to the company's public utility business. While the

Citizens case, *supra,* does state that the initial determination is for the utility to make, it also states that "[i]n any event the issue [of necessary or useful] is a factual one that the Commission may review." *Id.* SCWC's great failing is not having come before us in 1994.

SCWC cites four cases it believes support its position that since it had determined that its failure to ever use the American River water to supply potable water meant that these water rights never became necessary or useful, it did not have to come before us under section 851. None of the cases are helpful to SCWC.

SCWC relies heavily on *In re Pacific Gas & Electric Co* (1981) 10 Cal. P.U.C.2d 647. This case involved PG&E's sale of real property containing coal reserves that PG&E had originally purchased to provide fuel for a power plant which was cancelled, thus PG&E had no use for the property in question. In an investigation of the sale transaction, for which PG&E did not seek section 851 authorization, the Commission held that because the property was not necessary or useful at the time of the sale, the sale was not subject to section 851 review. SCWC claims the *PG&E* case supports its position because the water rights in question were not necessary or useful at the time it entered into the lease with Folsom. SCWC makes no effort to refute the other two reasons we gave in the Decision for why *Pacific Gas & Electric* does not help SCWC: PG&E had disposed of the entirety of its coal mine assets, and had not tried to split up an asset that was useful in serving customers; and unlike PG&E's shareholders, SCWC's shareholders have not accepted the risk of any replacement water rights that SCWC needs to acquire in order to make up for the portion leased away. (D.04-03-039, p. 51.)

SCWC further argues that in *Pacific Gas & Electric,* the Commission holds that if a utility could present evidence that the property was not used or useful, section 851 would not apply to a transaction involving that property. SCWC's primary problem here is that it never came to us with such purported evidence until it was forced to rebut ORA's challenge to the lease. Additionally, in the *PG&E* case, the property in question was never devoted to utility service; the coal reserves were going to fuel a power plant that was later cancelled. As the Commission stated in a later decision:

> "These two cases [*Pacific Gas & Electric, supra,* and *Citizens,* discussed below] illustrate the principle that property far removed from the utility's public service purpose does not fall within the ambit of Section 851."

In re Pacific Bell (1996) 65 Cal.P.U.C.2d 324, 327.

SCWC argues that is the case here too. However, the two situations are simply not comparable. Here, SCWC is a public utility water company in the business of providing water to the public. The water SCWC has provided its customers comes from two sources: surface water from its American River water rights, and ground water from wells it has developed. Its surface water rights, rather than being "far removed" from the utility's public service purpose, have been part and parcel of the utility property since the mid-1850's. See *Williamson v. Railroad Commission* (1924) 193 Cal. 22. It defies logic to think that SCWC could contemplate a lease in perpetuity of a portion of those water rights – which involve exactly the commodity it is in business to provide, and which source it has used to provide public utility customers with water – without at

least coming to us to argue it did not need our authority to do this.

SCWC also relies on *In re Citizens Utilities Co. of California, supra. Citizens* involved an investigation of a sale of timber rights some 17 years earlier, which had occurred without section 851 authorization. The Commission staff had argued that timber rights were necessary and useful because they afforded the utility protection over its water resources. The Commission disagreed, after hearing testimony that timber harvesting was being done compatible with protecting the water resources, and held that the timber rights were not necessary or useful to the provision of water to customers. SCWC argues that like the timber rights, the water rights that it leased to Folsom were not necessary or useful in the provision of water to its customers. SCWC does not address the significant distinction we make between timber rights and the water rights themselves, i.e., the very resource that the utility is responsible for providing. (See D.04-03-039, p. 52.)

SCWC's other two cases, *In re Valencia Water Co.* (1992) 47 Cal. P.U.C.2d 493, and *In re California Water Service Co.* (1994) 56 Cal. P.U.C.2d 4, are equally unhelpful to its cause. *Valencia* involved a wholly privately owned well which, when transferred by the public utility to another entity, did not lose its private character. It had never been used to provide water to the public. In *California Water Service Co.,* the property in question entailed several lots upon which the water company had once had wells, storage tanks, or booster plants which had at one time been used in public utility service. At the time of the sale, however, the property was depleted and the facilities had been removed. The Commission found the property

was no longer necessary or useful, and no section 851 review was required prior to its sale.

SCWC then criticizes two of the authorities we cite in support of our conclusion that the lease agreement required section 851 review. *In re Pacific Gas & Electric Co.* (1992) 45 Cal. P.U.C.2d 24, involved PG&E's fiber optic communications capacity. The Commission found that a portion of the property MCI wanted to use (in exchange for giving PG&E capacity on MCI's nationwide telecommunications system) was being used by PG&E to serve the public; thus the transaction was subject to section 851 review. SCWC says *Pacific Gas & Electric* is not factually applicable to its water rights situation.

While factually the cases have some differences, the fiber optic capacity in *MCI* can be viewed as analogous to the water rights situation here. The point made by the Decision is that a utility cannot decide that part of the same item of property is utility property and part is not, where part of that property is indeed being used in provision of utility service. SCWC, and Natomas Water Company before it, both made use of some part of their American River water rights to serve customers. At almost no point from the time SCWC purchased the Natomas Water Company and its water rights has SCWC failed to use some portion of those water rights for the provision of utility service. Certainly that was the case in 1994.

SCWC also criticizes our reliance on *In re Southern California Gas Co.* (1978) 84 Cal. P.U.C. 405. In that case, the gas company wanted to withdraw a portion of its existing natural gas transmission pipeline from utility service and to lease the facilities to an affiliate. The Commission found sufficient reason to remove the facilities from

public utility service because of the California capacity situation, and thus authorized the transaction. However, the Commission stated:

> "[D]etermination that justification exists for withdrawal is but one component in any Commission determination to authorize withdrawal from utility service and subsequent transfer and lease of public utility property pursuant to Section 851 of the Code. It is this Commission's duty, when public utility property is to be withdrawn and transferred, to assure that the transfer will not be adverse to the public interest. [Citation omitted]
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> "In addition to merely documenting the existence of excess transmission capacity in the SoCal system, this Commission must also analyze economic and environmental factors to determine in what manner withdrawal shall be implemented so as to be consistent with the public interest."
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> *Id.* at p. 418.

Again, SCWC argues the facts are not comparable; the facilities at issue in *Southern California Gas* had been used to serve the public, but the water rights at issue here had not. And again, we found differently. However, the additional importance of this case is that it delineates the process we must go through in reviewing a property transfer under section 851, in order to fulfill our own regulatory responsibilities. The Decision cites this case as an example illustrating how this Commission, long before 1994, conducted a thorough three-pronged review under section 851 before coming to its conclusion, and how it should have in this case done likewise, at the time the lease was contemplated.

SCWC continues its argument by applying section 851 to "the facts of this case." (App. Rhg., p.11.) The company asserts we err in concluding that the water rights at issue are useful utility property, because this conclusion ignores the testimony of the manager responsible for running the system, and the testimony of the company's experienced water rights counsel. SCWC states that by 1994, it had only used 3,451 of its 10,000 AFY allotment; the rest, including the 5,000 AFY to Folsom, were not being used, and had never been used by SCWC nor by its predecessor, Natomas Water Co.[4] SCWC was meeting customer demand. It could not foresee any use for the 5,000 AFY it leased; it projected it could meet future demand adequately through groundwater sources as well as its remaining 5,000 AFY of river water. As of 1993, it was using about 12,000 AFY in groundwater from its wells to serve customers.

SCWC argues that engineering and operational supply planning dictated using groundwater. It was plentiful and cheaper, since it did not require treatment the way surface river water did, and SCWC did not have the treatment facilities to process more than 5,000 AFY, which it could do at the Coloma Treatment Plant. (Cross examination of SCWC's witness Saddoris indicates that this assertion is at best misleading; SCWC currently contemplates running its Coloma plant 365 days a year instead of just 5 months of the year, in order to treat up to 10,000 AFY, until a new treatment facility can be constructed. (R.T., vol. 5, pp. 395, 413-414)) SCWC developed

[4] For decades, facilities for the diversion, transportation, and distribution of surface water were in place, and were maintained, by both Natomas and SCWC.

a business plan that called for reliance on groundwater rather than surface water, and submitted evidence of the planning process developed by SCWC's water manager and water rights counsel.

We continue to ask why all of this was not put before the Commission in 1994. Even if SCWC was so certain that these factors would put the transaction out of our reach, the appropriate action was to have come to us for a ruling to that effect. It chose not to do so at its peril, relying instead on its own evaluation that it did not need prior authorization under section 851.

SCWC criticizes the Decision's argument that SCWC should have retained the water rights as a kind of "insurance policy" (see D.04-03-039, p. 46), by arguing that we mention nothing that arose between the 1967 decision which authorized the assignment of the 22,000 AFY to Folsom and 1994 which would support a different result. However, this is not the point. SCWC had an obligation under law to come to us before leasing away its water rights, and it failed to do so. If we could see that nothing had changed between 1967 and 1994, so could SCWC. The company, therefore, should have had no reason whatsoever to want to avoid Commission review under section 851. Moreover, nothing that was said in the 1967 decision should have led SCWC to believe it was forever free from Commission scrutiny in terms of its water rights. Many utilities, as is evident from a number of the cases SCWC cites, come to us with an 851 request, stating they are uncertain whether 851 applies, but are coming to us out of

a sense of caution.[5] We then determine if our review is required by section 851. This is what SCWC should have done.

B. Alleged Violation of the U.S. and California Constitutions.

SCWC begins its argument by asserting that we have unconstitutionally extended our jurisdiction over SCWC's private property. SCWC contends that since our jurisdiction as established in Article XII, section 3 of the California Constitution is limited to public utilities – i.e., entities that have dedicated their property to public use – our assertion of jurisdiction over SCWC's allegedly completely private 5,000 AFY of American River water which has never been dedicated to public use is unconstitutional.

SCWC believes we misunderstand the nature of the water rights the company holds. In an apparent attempt to set us straight, the application for rehearing goes through a very lengthy discussion of such points as: 1) water rights are dedicated to public use only through an affirmative, unequivocal and voluntary action; the holder controls the extent of dedication, and a dedication of some portion of SCWC's water rights does not convert all of those rights to a public use and subject them to Commission regulation; 2) the public interest in dedicated water rights may be terminated through Commission consent or the end of public demands; 3) SCWC's American River water rights are private property that is transferable and divisible, and

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[5] Some, unfortunately, do not, thus necessitating after-the-fact review, as here.

are dedicated to public use only to the extent of a 5,000 AF dedication after acquiring the system from Natomas.

SCWC's discussion, however interesting as a foray into some aspects of the law of private water rights, is largely irrelevant to whether SCWC should have regarded those additional 5,000 AF as an insurance policy, at least to the extent of seeking the Commission's opinion on whether it could lease them at will or not. Not surprisingly, SCWC's cases most frequently deal with water rights that were private property, not public utility property. More troubling to us is that many if not most of those cases concern private companies that are not even public utilities. SCWC is, of course, a public utility over whom we have jurisdiction. It cannot seriously expect that such inapposite authority will be persuasive to us.

The key to the entire argument here remains that the facts do not support SCWC. Its water rights came with the purchase of Natomas; Natomas itself was using a portion of this water for public use, and had been doing so for many years. Nothing in the documentation of the sale of Natomas to SCWC indicates that the water rights obtained from that sale had been Natomas' private rights; in fact, quite the contrary is true, from the language contained in the contract for sale. SCWC continued similar use to irrigation customers. While that use tapered off around 1970, the Coloma treatment facility was then constructed, which allowed use of up to 5,000 AFY of potable surface water.

As of 1994, SCWC was not using more than 3,451 AFY of surface water out of those 10,000 available. However, it is not the case that SCWC, a public utility water company, was prevented from starting to use more of its surface

water rights for municipal/residential/commercial customers because of the terms of its contract. That it was at the time limited by the extent of its treatment facilities may be true, but this does not mean it was incapable of changing that situation in the future – and in fact, it has, as more of its wells have become more seriously contaminated. Also, the fact that it was using only a portion of its surface water in 1994 does not lead to the legal conclusion that the surface water it was *not* using was transformed into private property, hence obviating the requirement that the Commission review what SCWC was doing with that 5,000 AF under section 851.

At no point between the time SCWC purchased Natomas and the time it entered the lease agreement with the City did SCWC declare that a portion of its water rights was private property. At no time did it use any of that water for its own private purposes. Given the context of its being a public utility, with a portion of its public utility resources being surface water rights, those rights did not become private property either before or upon SCWC's entering the lease agreement.

C. Alleged Taking of SCWC's Private Water Rights in Violation of the U.S. and California Constitutions.

SCWC argues that in restricting its use of private property, i.e., the 5,000 AFY of American River water that it leased in perpetuity to the City, we have taken its property without compensation, in contravention of the 5th and 14th amendments to the U.S. Constitution and Article I, section 19 of the California Constitution. As with its other arguments, SCWC's entire takings argument

rests on the position that the water rights in question are private, as opposed to utility, property. SCWC spends six pages of its application for rehearing presenting an analysis of takings law as it applies to private water rights. While this discussion is interesting, it simply does not apply if the water rights in question are not private property.

The takings argument fails from two standpoints. First, as we have repeatedly stated, SCWC's argument that the leased water rights are private property lacks merit; therefore, there is no taking – property that is useful to the business of providing water to the public cannot be taken by our lawful exercise of our jurisdiction under section 851. Second, looking now at the Modification Decision, we have determined that the lease is valid as to Folsom and have ordered SCWC to file a section 851 application (which it has done) for authorization of the lease. This is exactly what SCWC has, since 1994, wanted to do with the 5,000 AFY of water it was not already using to serve customers. Hence, even if there were a shred of merit to SCWC's argument about private property, nothing about our actions at this point, taking into account the Modification Decision, amounts to a taking of any property of SCWC.

D. Alleged Depriving SCWC of its Constitutionally Guaranteed Right to Use and to Dispose of its Property by Voiding the Lease.

SCWC cites what it terms a relevant part of Article I, section 1 of the California Constitution, as follows: "All people . . . have inalienable rights. Among these are . . . acquiring, possessing, and protecting property . . . . "

SCWC argues that the Decision violates this provision because "it interferes with SCWC's right to put to use, and capture value from, its water rights through a lease arrangement. That infringes on SCWC's right to use and dispose of its private water rights." (App. Rhg., p. 42.)

The answer to this claim is the same as for SCWC's taking argument. First, we have found that SCWC's water rights are not private. Secondly, the Modification Decision, with its finding that the lease is valid as to Folsom and its requirement that SCWC file an 851 application for the continuation of the lease, effectively continues the lease in force. That SCWC's choice to not come before us for prior authorization has resulted in a penalty and revised rate treatment, and that we may put certain conditions on SCWC for the future, are simply consequences that flow from SCWC's being a regulated water company.

E. Alleged Wasteful and Unreasonable Use of Water in Violation of Article X, Section 2 of the California Constitution Because The Decision Takes Water from an Existing Beneficial Use for Future Speculative Uses.

SCWC spends six pages of its application for rehearing (see App. Rhg., pp. 43-48) arguing that the Decision, in taking water from an existing beneficial use and subjecting it to future speculative uses, effectuates an unconstitutionally wasteful and unreasonable use of water. SCWC asserts:

> "[U]nless modified to expressly protect the rights of the City of Folsom to the maintenance of the water supply and expressly protect its right to continued water supply deliveries, Decision

> 04-03-039 effectuates an unreasonable use of water in violation of Article X, section 2 of the California Constitution." App. Rhg., p. 43.

The Modification Decision moots this argument by modifying the Decision to do exactly as SCWC has argued it must.

F. Alleged Unlawful Allocation of Lease Revenues to Ratepayers.

SCWC alleges that our allocation of 70% of the lease revenues to ratepayers is based on an erroneous assumption that ratepayers, not shareholders, have borne the cost of obtaining the water rights at issue as part of the purchase price of the Natomas Water Company. SCWC maintains that "SCWC's shareholder [sic], not ratepayers, paid for the purchase of the Natomas Water Company in 1964, and the Commission allowed the purchase price to be recorded in rate base." (App. Rhg., p. 49.) We have found that the value of the water rights obtained through this purchase was subsumed in the purchase price. If something is recorded in rate base, it contributes to the foundation from which future rates are derived. Thus on this basis alone, SCWC's argument fails.

SCWC goes on to argue that since no specific amount of the purchase price was attributed to water rights, they were obtained for free; thus ratepayers could not have paid for them. However, even if we were to adopt SCWC's position and conclude that the water rights were obtained for nothing, that means shareholders did not have to pay anything for them either. Under this scenario, it does not logically follow that all the proceeds from the lease should go to shareholders.

SCWC then argues that even if some portion of the purchase price was allocated to water rights, ratepayers did not pay for these rights. This is because, according to SCWC, water rights are real property, and under the Commission's ratemaking rules, ratepayers do not reimburse shareholders for the cost of purchasing real property. SCWC cites two Commission decisions in support of this proposition, neither of which is helpful to its argument.

In re Pacific Gas & Elec. Co. (2001) D.01-05-076, 2001 Cal. P.U.C. LEXIS 284, involved the sale of certain parcels of land on which PG&E had hoped to construct a power-generating wind farm. These parcels were not in rate base and were non-utility property. The Commission awarded the entire gain on sale to shareholders, reasoning that shareholders had borne the risk for the property. The Commission stated: "In particular, we note that rates support none of the maintenance costs, property taxes, or other costs associated with non-utility property." *In re Pacific Gas & Elec. Co.* (2001) D.01-02-044, 2001 Cal. P.U.C. LEXIS 88, also involved the sale of non-utility property not in rate base (land on which PG&E had planned to build a substation, which was never built).

These cases are quite different from the one before us, where we have concluded that the water rights at issue *are* utility property. The entire cost of the Natomas Water Company purchase, which included 32,000 AFY of water rights, was part of rate base. Ratepayers have been paying shareholders a rate of return on that investment; shareholders have not paid ratepayers anything. As the water rights were not depreciable, this return never decreased. Shareholders were not responsible for recovery of any of the carrying costs. It is completely appropriate under the

facts of this case that ratepayers should receive a portion of the proceeds of the lease from its inception. Similar results have been reached in situations where a rate based item has been sold (rather than leased in perpetuity). Cf. *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission* (D.C. Cir. 1973) 485 F.2d 786 (cert. denied 1974, 415 U.S. 935). To alleviate any misunderstanding of the rationale underlying our allocation, we will clarify the discussion in the Decision in several respects, in accord with this discussion.

G. Alleged Application of an Illegal Interest Rate.

SCWC argues that the 7% interest rate the Decision applies to the refund of 70% of the lease revenues to ratepayers is arbitrary and unlawful. SCWC maintains there is no Commission precedent for so large an interest rate, and that by analogy to memorandum accounts, the interest rate should be the 90-day commercial paper rate.

SCWC accurately points out that our practice for funding memorandum accounts and other short term liabilities has often been to apply the 90-day commercial paper rate. However, we are not bound by that practice when the facts and circumstances do not warrant it. We do not believe the 90-day commercial paper rate is appropriate here, where SCWC has been crediting the revenues from the leased water rights to shareholders for nearly 10 years. As the Decision indicates, a strong argument can be made that the interest rate should be fixed at SCWC's authorized rate of return for the Arden-Cordova district. That represents the return that SCWC's shareholders could be expected to have achieved on the lease revenues,

which under SCWC's unauthorized treatment went entirely to shareholders for that lengthy period of time. Instead, however, we have decided to adopt ORA's *lower* proposed interest rate of 7%. This is appropriate, given all the facts and circumstances before us. As with our allocation discussion, we will clarify our discussion of this issue accordingly.

H. Alleged Imposition of an Unlawful and Unwarranted Fine.

There is no question that we have the authority to impose fines for violation of statutes, regulations, and our own orders. Sections 701, 2107, 2108. The legal conclusion that SCWC violated section 851 by not coming to us prior to signing the lease agreement with the City forms the basis for imposition of the fine. There is nothing unlawful about this. As the Decision makes clear, we made the calculation after analyzing the facts according to the standards we routinely use in determining the appropriate amount of fine to impose. Rather than imposing even the minimum fine allowable,[6] we have fined SCWC the amount urged by ORA – $180,000 (based on $20,000 for the section 851 violation and an additional $20,000 for each year SCWC did not record the revenues correctly) – and have suspended the remainder. This fine is very minimal for a company the size of SCWC. To put this in some perspective, the Decision authorizes a rate increase for SCWC's Region III Service Area of over $8 million in 2003 alone, which is a 12.6% increase over existing rates in that Service Area. SCWC's recently filed section 851

[6] $1,095,000; see D.04-03-039, p. 57.

application shows total company revenues (water and electric) approximating $212 million for the 12 months ending in May 2004. This claim has no merit.

THEREFORE, IT IS ORDERED that:

1. Decision 04-03-039 is modified as follows:

   a. The second, third, and fourth paragraphs of the discussion entitled **"B. Ratemaking Treatment for Lease Revenues"** on pages 54-56 are modified to read:

      "We do not accept that proposition. When SCWC purchased the Natomas Water Company in 1964, the transfer of water rights was included in the transaction. As even SCWC admits, certain amounts of those rights were exercised previously by the Natomas Water Company and subsequently by SCWC. The entire cost of the Natomas Water Company purchase, which included 32,000 AFY of water rights, was part of rate base. Ratepayers have been paying shareholders a rate of return on that investment; shareholders have not paid ratepayers anything. As the water rights were not depreciable, this return never decreased. Shareholders were not responsible for recovery of any of the carrying costs. We see no reason to assign the full benefit of the water rights to shareholders merely due to the fact that as SCWC states, 'At that time – 1963 – it was common practice to attach no monetary value to water rights

and therefore SCWC acquired these water rights for free.' [Fn omitted.] The fact that the parties may not have assigned a particular line item value to the water rights does not mean those rights were free, especially since Natomas had obtained a benefit from the exercise of some of those water rights. Notwithstanding the lack of a separate itemization of the value of the acquired water rights, it is clear that the value of those property rights was included in the overall purchase price paid by SCWC. We determine that the entire amount of water rights was utility property at the time of the purchase. After the 1967 sale to Folsom, the entire remaining 10,000 AFY, which includes the 5,000 AFY being leased to Folsom, continued to be utility property.

"Based on the fact that ratepayers have paid to, and for, shareholders the carrying costs (i.e., rate of return) of these water rights as part of the purchase price of Natomas, it is reasonable to allocate to ratepayers most of the benefits of the lease from its inception. Similar results have been reached where a rate based item has been sold rather than leased (in perpetuity). Cf. *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission* (D.C. Cir. 1973) 485 F.2d 786 (cert. denied 1974, 415 U.S. 935). On the other hand, it is appropriate to assign shareholders a minority of the lease revenues in order to provide some

reward for the leasing of an asset that probably would have been underutilized for most of the period from 1994 to the present had it not been leased. Based on these considerations and the unique facts of this case, we determine that 70% of the lease revenues should be assigned to ratepayers and 30% to shareholders. This apportionment should apply to any lease revenues accrued from the inception of the lease through the date of this decision.

"SCWC's failure to seek section 851 review for the lease creates an unfortunate issue of how to enable ratepayers to gain the benefit of their appropriate 70% share of the revenues that SCWC previously has unilaterally assigned for the benefit of shareholders. We agree with ORA that the best approach is to require SCWC to credit customer bills by the appropriate ratepayer share, plus interest. A strong argument can be made that the interest rate should be fixed at SCWC's authorized rate of return for the Arden-Cordova district. That represents the return that SCWC's shareholders could be expected to have achieved on the lease revenues, which under SCWC's unauthorized treatment went entirely to shareholders. Instead, however, we will adopt ORA's *lower* proposed interest rate of 7%. Accordingly, SCWC is required to refund to ratepayers 70% of lease revenues accrued from the inception of the

lease through the effective date of this decision, plus 7% interest."

b. Subsection **B** at the bottom of page 56 should be re-labeled **C**.

c. Finding of Fact 30 is modified to read:

"The entire cost of the Natomas Water Company purchase, which included the rights to 32,000 AFY of American River water, was included in rate base.

Ratepayers have been paying shareholders a rate of return on that investment; shareholders have not paid ratepayers anything. As the water rights were not depreciable, this return never decreased. Shareholders were not separately responsible for any of the carrying costs."

d. Conclusion of Law 30 is modified to read:

"Because ratepayers have borne the carrying costs (rate of return) of obtaining the water rights that were leased to the City of Folsom, and yet, on the other hand, leasing those water rights has resulted in a beneficial use that may not have been realized absent the lease, it is reasonable to allocate 70% of the benefits of the lease to ratepayers and 30% to shareholders, from the inception of the lease until the effective date of this decision."

2. The application for rehearing filed by the Southern California Water Company of Decision 04-03-039, as

modified by Decision 04-04-069 and the decision herein, is denied.

3. This proceeding is closed.

This order is effective today.

Dated September 2, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
Commissioners

I will file a dissent

/s/ SUSAN P. KENNEDY
Commissioner

Decision No. 71889

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA WATER COMPANY and CITY OF FOLSOM for an order authorizing the sale of certain properties of Southern California Water Company.	Application No. 48786 (Filed September 13, 1966)

O'Melveny & Myers, by *Donn B. Miller*, for Southern California Water Company; McDonough, Holland, Schwartz, Allen & Wahrhaftig, by *Martin McDonough*, for City of Folsom, applicants.

John D. Reader, for the Commission staff.

OPINION

This request of Southern California Water Company (seller) and City of Folsom (buyer) for authority to transfer seller's water system serving the Folsom area in Sacramento County to the City of Folsom was heard before Examiner Coffey in San Francisco and submitted for decision on November 7, 1966.

The Folsom system of seller does not lie entirely within the limits of the City of Folsom. However, substantially all of the nearly 1,500 customers served through the property to be transferred are within the city limits of the City of Folsom. The largest single customer of the system, Aerojet General Corporation, is outside the City and is served under the terms of a special contract.

On August 22, 1966, seller and buyer entered into an agreement, a copy of which is attached to the application as Exhibit II, providing for the sale of the seller's Folsom water system used in connection with the performance of public utility service by seller. The agreed cash purchase price is $825,000, plus an amount equal to the cost to seller of all approved capital additions.

The properties of the Folsom District are recorded on seller's books, as of August 31, 1965, as follows:

Utility Plant	$913,280
Reserve for Depreciation	(178,197)
Advances for Construction	(109,660)
Contributions in Aid of Construction	(42,660)
Net	$582,763

Seller states that at or substantially concurrently with the sale of these properties it will repay all deposits, including accrued interest, made by its Folsom customers to establish credit.

Buyer, under the terms of the agreement, shall assume the obligations of seller for reimbursement of advances for construction under the terms of the contracts relating to such advances upon the transfer of the property associated with such advances.

Buyer, having determined to acquire the properties which are the subject of this request, petitioned this Commission in Application No. 46026 to determine the just compensation for essentially the same properties. Application No. 46026, now pending before the Commission, is being held in suspense pending the negotiations which led to the agreement herein being considered. Buyer and seller state that the agreement is preferable to the

expensive and uncertain results of protracted litigation and that the compromises reflected in the agreement were arrived at in arm's length bargaining and represent an attempt to arrive at a workable and logical result rather than the parties' judgment concerning the outcome of such litigation.

In addition to the Folsom water system, seller also serves water in the area of Cordova which is adjacent to the Folsom system and traversed by the Valley Canal, one of the properties to be transferred to buyer. The agreement provides that buyer shall have eleven-sixteenths fractional interest in all water and water rights, in and to the flow of the South Fork of the American River, which are owned or claimed by seller on the closing date. At such time as seller can obtain the diversion of its water from the to-be-constructed Folsom South Canal, buyer will transfer to seller without cost that part of the Valley Canal below the point at which the Valley Canal is intersected by the Folsom South Canal. A witness for seller testified that there are adequate water supplies to serve present and future customers in the Cordova area and that no shortage of water was anticipated as a result of this transfer of properties in the foreseeable future.

We find that:

1. The terms of the purchase agreement adequately protect the interest of customers and refund contract holders in deposits and advances for construction.

2. Buyer has the ability to acquire and operate seller's Folsom water system without interruption in service.

3. The dedicated area of service of seller's Folsom water system extends outside of the boundaries of buyer.

4. Adequate supplies of water are available to serve seller's customers in the Cordova certificated area.

5. Upon the consummation of the proposed transfer seller will no longer be performing public utility service in the area of the properties to be sold.

6. Subject to the conditions set forth in the order which follows, the proposed sale and transfer will not be adverse to the public interest.

We conclude that the application should be granted as provided by the following order.

ORDER

IT IS ORDERED that:

1. Within one year after the effective date of this order, Southern California Water Company may sell and transfer to City of Folsom the properties referred to herein, substantially in accordance with the terms described in the agreement attached to the application herein and designated as Exhibit II, but subject to the conditions of this order.

2. Before the transfer of its water system assets, seller shall return to customers any refundable deposits made to establish credit and shall file a statement that all deposits have been refunded with the Commission within ten days after said transfer.

3. The foregoing authority is conditioned upon the filing in this proceeding of a stipulation by buyer that:

(a) Buyer will be subject to all legal claims for water service which might have been enforced against seller, including such claims as may exist in territory outside of buyer's boundaries.

(b) As to the rates, rules and conditions of service which buyer will apply in the service area of the system herein authorized to be transferred, it will not discriminate between service rendered outside its city boundaries and service rendered inside said boundaries, except insofar as it may adjust such outside rates and charges to offset any reasonable tax burden sustained by water users within the city in subsidizing the operation of the city's water system.

4. Upon compliance with all of the conditions of this order, seller shall stand relieved of all of its public utility obligations in the area served by the transferred system, and may discontinue service concurrently with the commencement of service by buyer.

5. Within ten days after the date of actual transfer, seller shall file in this proceeding written notice of the date of transfer, the date upon which buyer shall have assumed operation of the water system authorized herein to be transferred, and a true copy of the instrument or instruments of transfer which may be executed to effect such transfer.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 24th day of JANUARY, 1967.

/s/ Peter E. Mitchell
President

/s/ William M. Bennett
/s/ Augustus G. Gatov
/s/ Fred P. Morrissey

Commissioners

Commissioner WILLIAM SYMONS, JR. did not participate in the disposition of this proceeding.

Decision No. 67299

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of NATOMAS WATER COMPANY and SOUTHERN CALIFORNIA WATER COMPANY for an order or orders (a) authorizing the sale of the public utility water system property of Natomas Water Company to Southern California Water Company; (b) authorizing Natomas Water Company to refund certain consumers' deposits; (c) authorizing Southern California Water Company to render water service to the public in the territory served by Natomas Water Company at the rates of Natomas Water Company presently in effect and authorizing Natomas Water Company to discontinue rendering water service and relieving Natomas Water Company of further utility obligations; (d) authorizing Southern California Water Company to assume certain liabilities of Natomas Water Company; and (e) authorizing Southern California Water Company to exercise rights under any franchises to be acquired by it in order to render water service in the area presently served by Natomas Water Company.

Application No. 46058
(Filed December 23, 1963)

Downey, Brand, Seymour & Renwer, by *Harry B. Seymour* and *John F. Downey*, for Natomas Water Company.
O'Malveny & Meyers, by *Lori J. Miller*, with *C. T. Mass*, Consulting Engineer, for Southern California Water Company.
Louis A. Boli, III and *Martin McDonough*, for City of Folsom, and *John E. Kapp, Jr.*, in propria persona, interested parties.

OPINION

Natomas Water Company seeks authority to sell its operating utility properties in Sacramento County to Southern California Water company, which joins in the application. Copies of the purchase agreement and other documents relating to the sale are annexed as exhibits to the application or are included in the record as Exhibits A through G. The basic price to be paid by purchaser for the properties is stated to be $1,095,410.00. The application was submitted for decision at the conclusion of a public hearing held, after due notice, before Examiner Cline at Sacramento on February 25, 1964.

Natomas is a California public utility corporation which for many years has supplied water for domestic and other uses in and in the vicinity of the City of Folsom.

Southern California is a California public utility corporation which, following consolidation of some twenty public utility corporations in 1929 and with subsequent acquisitions and additions, has rendered public utility water service in the counties of Los Angeles, Kern, San Bernardino, Orange, Imperial, Ventura and Sacramento, through sixteen operating districts.

The purchase agreement, in which the properties are described, recites that buyer, after acquisition, will assume seller's obligations to refund advances for construction and that seller will refund all customers' deposits to guarantee credit due and payable as of the closing date; all such deposits not then due and payable will be transferred to buyer for refund when due.

The record reveals that Southern California has adequate financial resources with which to purchase the properties and that it proposes to render water service to the public in the territory served by Natomas, through the property being sold, at rates of Natomas presently in effect.

The purchase agreement recites, and the record shows, that the City of Folsom has evidenced an interest in acquiring the Folsom division of Natomas' properties and is opposed to authorization of the sale of that portion of the system.[1]

The city, at the hearing, moved to hold this transfer proceeding in abeyance pending outcome of its petition for determination of just compensation, and later submitted a petition to the same effect, signed by a number of residents (Exhibit H). Both Natomas and Southern California opposed the motion on the grounds that: (1) ownership of the properties at the time of condemnation would not affect the issue of just compensation or otherwise be

[1] The record shows that the city filed a petition of the second class on December 11, 1963 (Application No. 46026), for determination of just compensation for the Folsom Division properties, and that certain preliminary proceedings have been had in connection therewith (Public Util. Code, Sec. 1401, et seq.).

prejudicial to the city or its residents in such a proceeding; (2) the delays attendant upon fixing just compensation by the Commission and holding an election by the city could impede construction of facilities to meet growing demands if, during the interim, the ratio of advances for construction to Natomas' total utility plant (less depreciation reserve) should exceed 50%, thus requiring specific authorization by the Commission for any main extensions required to provide additional service (*Water Main Extension Rule*, 60 Cal. P.U.C. 318, 327, par. A.2.a.).

The motion to hold the instant application in abeyance should and will be denied. It is well settled that a proceeding in eminent domain, in which the commission's function of fixing just compensation is an integral part where public utility properties are being taken, is an action *in rem*, in which everyone who can possibly be affected by the decision has a right to appear and assert his own rights. Granting the herein request to transfer could not possibly prejudice the City of Folsom.

There is nothing in the record of the instant transfer proceeding, or in the present posture of the just compensation petition, to suggest that a delay in issuing our transfer authorization would serve any useful public purpose.

We find that the proposed transfer is not adverse to the public interest. It will, therefore, be authorized in accordance with the ensuing order. Such authorization, however, shall not be construed as a finding of the value of the rights and properties herein authorized to be transferred, or as indicative of amounts to be included in proceedings for the purpose of determining just and reasonable rates.

ORDER

IT IS HEREBY ORDERED that:

1. Natomas Water Company, a corporation, after the effective date of this order, may sell and transfer and Southern California Water Company, a corporation, may purchase, take and operate the public utility properties and rights described in the purchase agreement herein, dated December 19, 1963 (Exhibit B attached to the application and in evidence) substantially in accordance with the terms and conditions of said agreement and subject to the provisions of this order.

2. Southern California Water company, after acquisition of the properties herein authorized to be transferred, may exercise any certificate, franchise, right of way, license or permit, including those specifically referred to in said purchase agreement, in the areas presently served by Natomas Water Company through the properties herein authorized to be transferred.

3. On or before the date of actual transfer, seller shall transfer and deliver to buyer, and buyer shall receive and preserve, all records, memoranda and papers pertaining to the construction and operation of the properties herein authorized to be transferred, subject to access by seller, however, as provided in said purchase agreement.

4. Within thirty days after the consummation of the transfer herein authorized, buyer shall notify the Commission, in writing, of such consummation and within said period shall file with the Commission a true copy of any deed, bill of sale, agreement or other instrument which may be executed to effect said transfer, together with

copies of all journal entries which may be used to reflect said transfer in buyer's books of account.

5. The tariff service area map, rate schedules renumbered to be in harmony with buyer's tariffs, ditch system rules and lists of contracts and deviations of seller now on file with this commission shall be refiled within thirty days after the date of actual transfer under the name of Southern California Water Company in accordance with the procedure prescribed by General Order No. 96-A, together with such revised and additional tariff sheets acceptable to the Commission, as are necessary to provide for the application of Southern California Water Company's present rules and forms to service in the area transferred herein.

6. On or before the end of the third month, after the consummation of the transfer as herein authorized, buyer shall cause to be filed with the Commission, in such form as it may prescribe, an annual report, or reports, covering the period commencing with the first day of the current year to and including the effective date of the transfer.

7. Upon completion of the transfer herein authorized and due compliance with all the provisions of this order, Natomas Water Company, a corporation, shall stand relieved of all further public utility obligations and liabilities in connection with the operation of the public utility water system and properties herein authorized to be transferred.

8. The authority herein granted will expire if not exercised within one year after the date of issuance of this decision.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 3rd day of June, 1964.

WILLIAM M. BENNETT
President
PETER E. MITCHELL
EVERETT C. McKEAGE
GEORGE G. GROVER
FREDERICK B. HOLOBOFF
Commissioners